91-435

Supreme Court, U.S.
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No.

IN THE

Supreme Court Of The United States

October Term, 1991

KEVIN MC KNIGHT,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE
NEW JERSEY SUPERIOR COURT,
APPELLATE DIVISION

PETITION FOR A WRIT OF CERTIORARI

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Dated: September 16, 1991

QUESTIONS PRESENTED

The Petitioner, a black college student, was driving a motor vehicle which was stopped by a police officer for an alleged motor vehicle violation. As the car was slowing down, the officer noted the front-seat passenger reach downwards and then turn to the left and reach towards the back of the vehicle. The only movement of the Petitioner was a small upward movement of his right shoulder. The officer did not notice until he reached the car that there was a third person lying down in the back seat.

The questions presented under these facts are:

1. Whether a Terry frisk of the Petitioner was improper in a motor-vehicle-violation case, where the police officer had no indication

that any occupant of the vehicle was armed, had no knowledge that any occupant had been involved in violent criminal conduct and where prior to the stop the only movement of the Petitioner which the officer noticed was that, as the car was pulling over to the curb, the Petitioner raised his right shoulder "a bit"?

2. Where the police officer at a suppression hearing has no recollection of how an approximately 2½" bulge [later identified as a package of cocaine] in the pants of the Petitioner felt and does not testify that he concluded the bulge might be a weapon before he seized and searched it, has the Petitioner's constitutional rights been violated under the Fourth Amendment?

In New Jersey, there is no express rule allowing an aggrieved party to file

a motion for reconsideration of an adverse ruling in a motion to suppress. There is a rule permitting a party in such a circumstance to seek leave for an interlocutory appeal. In the case at bar, the Petitioner's motion to suppress was granted in part -- that is, the items found on his person were suppressed. The State failed to file an interlocutory appeal. Nor did the State file a notice of motion, which is the proper procedure in general motion practice in New Jersey and which notice should include, inter alia, the date and time for a hearing. Instead the State filed a letter-brief in which the salutation thereof was to the assignment judge and not the motion judge. The Petitioner in good faith believed that there was no proper motion before the court. The court, without a hearing, reversed its decision to grant

in part the Petitioner's motion to suppress.

The questions presented under these facts are:

[Note: Petitioner reserves the right to argues Questions 3 and 4 in the event certiorari is granted on Questions 1, 2, and 5, but does not include Questions 3 and 4 among the reasons for the grant of certiori]:

3. Where (1) the State failed to file a Notice of Motion for Reconsideration but (2) did file a letter-brief with the salutation thereof addressed to the assignment judge (and not the motion judge) and where furthermore (4) as a consequence of this unorthodox procedure the Petitioner was led into non-action as he in good faith believed that no Motion was before the court and certainly no hearing had been

scheduled, whether under these circumstances the Petitioner has clearly been denied his due process of law rights to notice and an opportunity to be heard when the motion judge in express response to the State's letter-brief reversed its decision to grant in part Petitioner's Motion to Suppress, even though courts may have inherent power to revise their judgments?

4. Whether the Petitioner was denied his due process of law rights where the motion judge allowed a letter brief to constitute a motion without notifying the adverse party, especially where the court rules do not expressly allow a party to seek reconsideration of a motion to suppress?

Certiorari is also sought by the Petitioner on the following ground:

5. Whether a Petitioner's

constitutional rights were violated where responses of jurors showed that the milieu of the community evidenced racial prejudice, and the trial judge failed, after request by counsel, to question the jury panel specifically concerning racial prejudice?

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

KEVIN MC KNIGHT, Petitioner
v.
STATE OF NEW JERSEY, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
NEW JERSEY SUPERIOR COURT
APPELLATE DIVISION

The petitioner Kevin McKnight respectfully prays that a writ of certiorari issue to review the judgement and opinion of the New Jersey Superior Court, Appellate Division entered in this proceeding on April 1, 1991.

OPINION BELOW

The order of the New Jersey Supreme Court of June 18, 1991 denying certification is reprinted in the Appendix hereto, p.51a , infra;

The opinion of the New Jersey Superior Court, Appellate Division, not reported,

is reprinted in the Appendix hereto, p.31a , infra;

JURISDICTION

The judgment of the New Jersey Superior Court, Appellate division, was entered on April 1, 1991. A timely petition for certification with the New Jersey Supreme Court was sought on May 1, 1991 and denied on June 18, 1991.

This petition for certification was filed within 90 days of that date.

The jurisdiction of this court to review the judgment of the Appellate Division is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. AMENDMENT IV, SEARCHES AND SEIZURES, PROVIDES:

The right of the people to be secure in their persons, houses, papers, and

effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. AMENDMENT VI, JURY TRIAL FOR CRIMES AND PROCEDURAL RIGHTS, PROVIDES:

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. AMENDMENT XIV, SECTION I, DUE PROCESS CLAUSE, PROVIDES:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In November, 1988, the Petitioner, who is an African- American, was a college student at St. Peter's College. Prior to the subject incident, he had no criminal record.

On the date of the incident he drove to New York City in his girlfriend's rental car with a boyhood friend, Calvin Alexander (who sat in the right-front passenger seat) and with a friend of Mr. Alexander's (who rode in the back seat).

After they had eaten at a restaurant, the Petitioner drove Mr. Alexander, at Mr. Alexander's request, to two 24-hour stores. Each time Mr. Alexander returned to the car with a bag. The Petitioner did not know what was in these packages.

I. As to the stop-and-frisk:

At the hearing on Petitioner's motion to suppress, the following pertinent testimony was heard:

Police officer Cleri claimed that since the vehicle in which Petitioner was driving was being operated in excess of the speed limit, he decided to effectuate a stop.

After the officer activated the various overhead lights and spotlights, the Petitioner's automobile responsively slowed down and moved onto the shoulder of the highway. There was no weaving nor was there any evasive change of lane by Petitioner's car.

While the Petitioner's vehicle was coming to a halt, the officer saw the right-front passenger reach downwards and then turn to the left and reach towards the back of the vehicle.

The only movement made by the Petitioner was that the Petitioner's right shoulder moved upward. Officer Cleri did not feel fearful after seeing these movements -- indeed the movement could have been explained by Petitioner's turning off the car radio.

After approaching the vehicle, the officer noticed a third person crouched in the back seat.

There was no unusual movement after the automobile was stopped.

The officer testified that after noticing and feeling a soft bulge in the left shoulder area of Mr. Alexander's person, he reached under the lapel and seized a clear plastic bag containing a substance which was later identified as marijuana.

The officer then performed a patdown of the Petitioner, during which

he felt a bulge in the Petitioner's belt-line area.

Officer Cleri had no present recollection [at the suppression hearing] as to how the package of cocaine which was found on the Petitioner's person[1/] felt prior to its seizure.

The Officer did not testify that he believed anything on the Petitioner felt like a weapon, and indeed the motion judge noted in his findings suppressing the evidence that "Nothing felt like a weapon" prior to the search. See Transcript dated July 11, 1989 at page 20.

Nonetheless, the officer removed from the top portion of Petitioner's

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[1/] At trial, Petitioner testified any controlled dangerous substance found in his clothing was actually placed on him by the front-seat passenger as the car was being stopped.

pants a clear plastic bag. The contents of this bag were later determined to be cocaine.

The officer also found in Petitioner's pocket a foil packet of a substance later identified as being cocaine.

The officer also found $950 in cash on the Petitioner's person. The cash included a single $50 bill, thirty-one $20 bills, twenty $10 bills and sixteen $5 bills. A Panasonic paging device was also found on Petitioner's person.

II. As to Procedure in respect to the Motion to Suppress and to that utilized by the State in seeking to have the granting, in part, of Petitioner's Motion to Suppress reconsidered by the court:

Petitioner properly filed a notice of motion seeking to suppress the evidence found on his person and in the vehicle.

In his Brief in support of this motion, the Petitioner relied, inter alia, on the Fourth Amendment of the federal constitution.

On July 11, 1989, the motion judge granted in part Petitioner Kevin McKnight's duly filed Motion to Suppress, that is, suppressing the evidence allegedly seized from the Petitioner's person but denying the motion as it related to the paraphernalia found in the borrowed motor vehicle.

The State failed to file an application for leave to appeal. See generally New Jersey Court Rules, R. 2:3-1 and R. 2:5-6.

The State did not file a notice of motion seeking reconsideration of that part of the judge's decision which

was adverse to it.[2/]

However, on July 24, 1989, the State filed a letter-brief dated July 20, 1989, seeking such reconsideration. The motion judge's name appeared in the address section of the Brief. However, the salutation named the assignment judge, Judge DiGisi.

The letter-brief's "re" referred to a motion requesting reconsideration which had never been filed.

The Petitioner did not respond to this letter brief as no motion had been filed by the State. Moreover, there is no rule in New Jersey permitting reconsideration of a motion to suppress.

Since the State had not filed a

[2/] There is no express rule in New Jersey permitting reconsideration of a motion to suppress. The State failed to follow the general motion practice rule, that is Court Rule 1:6.

notice of Motion, no hearing was scheduled nor held.

By letter dated October 11, 1989 which was addressed to the acting assistant prosecutor, the motion judge -- who stated that he had read the State's brief and had restudied his notes -- communicated his decision to deny Petitioner' McKnight'smotion to suppress evidence in its entirety. Counsel for defendant also received a copy of this letter.

Counsel for Petitioner timely filed in New Jersey's Appellate Division an application for leave to appeal the interlocutory decision of October 11, 1989.

The Petitioner also filed a motion for a stay of trial pending the Appellate Division's determination. The stay was denied; however, the judge stated he

would continue the case without a date until the Appellate Division had ruled on the Petitioner's application.

Petitioner's application for leave to appeal was subsequently denied.

By letter of November 8, 1989, the State submitted a Proposed Order to the court. On November 9, 1989, the Court signed an Order memorializing the written decision of October 11, 1989.

The Petitioner filed an Objection to the Proposed Order as being violative of New Jersey's 5-day rule.

The subject evidence was not suppressed at trial and on February 7, 1990, the Petitioner was convicted in a jury trial.

III. As to the voir dire proceedings:

At the voir dire proceedings, the trial judge read to the prospective panel a litany of questions which did not

include a specific question about racial prejudice. There was however a question which included a generalized reference to prejudice.

The members of the prospective panel had been asked to raise their respective hands during the reading of said litany if they had a response to a specific question. One member of the original prospective panel was disqualified for apparent racial prejudice even though he had not responded to the general prejudice inquiry.

The litany was not repeated for subsequent potential jurors. Two members of that group admitted prejudice against "coloreds".

Any member of the pool who chose to veil his racial prejudice could evade inquiry by simply not raising his hand.

Defense counsel repeatedly objected

to the litany and to the group-manner of voir dire especially in light of the taintedness of the jury pool and asked for specific, individual questioning as to racial prejudice of each member of the pool. The trial judge continually refused to make specific queries aimed at revealing racial prejudice. Defense counsel's motion for mistrial was also denied.

* * * *

All the above constitutional claims were raised and preserved throughout the appellate process in the appellate briefs.

* * * *

The Petitioner has been on bail throughout the appellate and certiorari process.

REASONS FOR GRANTING WRIT

This case involves the frisk and search of the African-American driver of an automobile stopped for speeding.

This case presents the Court with two opportunities to give important guidelines for court and enforcement officials to follow in frequently occurring Terry patdown situations, which involve movements by occupants of a motor vehicle during a minor traffic violation stop. At present, the law is unsettled and important conflicts of decisions exist regarding both the origin and scope of such patdown searches.

This case also involves a significant question in respect to jury selection.

Finally, the erroneous nature of the decision below gives rise to the importance of Supreme Court review.

I.

REVIEW IS WARRANTED TO RESOLVE CONFLICT AND UNCERTAINTY AS TO WHETHER A MINOR "FURTIVE" OR NERVOUS MOVEMENT BY A PERSON JUSTIFIES A FRISK, PARTICULARLY WHEN THE PERSON IS THE DRIVER OR OCCUPANT OF A VEHICLE WHICH HAS BEEN STOPPED FOR A MERE TRAFFIC VIOLATION.

A valid Terry frisk requires finding that adequate reasons for suspecting criminal activity were established before the frisk and that the frisk was in response to reasonable apprehension of danger to the enforcement officer. See Terry v. Ohio, 382 U.S. 1 (1968).

In the case at bar, the Petitioner merely lifted his right shoulder as the car he was driving was coming to a halt at the request of the police. There was no probable cause or reasonable suspicion directed at this particular Petitioner which would justify a frisk or search. See generally Ybarra v.

Illinois, 444 U.S. 85, 91 (1979)

The ruling by the state court in this case, hence, misconstrued and is in conflict with Terry.

Additionally, there is a general confusion in lower federal and state courts as to the parameters of a Terry frisk, that is, when furtive or nervous movements justify a patdown or indeed a more invasive search by an enforcement officer.

The Eight Circuit found in United States v. Moore, 554 F.2d 1086 (D.C.Cir. 1976) that a black man, in a non-motor vehicle case, who took two steps back could not be reasonably deemed to be armed or a danger to the community.

In an automobile-stop case involving additional "furtive movements", the Seventh Circuit upheld a search under the defendant's jacket when the defendant,

after the police car was in sight, weaved his vehicle, raised himself up and appeared to reach towards the floor. See United States v. Nash, F.2d 1359 (7th Cir. 1989)

State courts generally hear the bulk of traffic infraction cases where a frisk and then full-scale search were performed, because the fact is that the policing of the nation's highways is under the jurisdication of local and state officers. Hence, almost by default, the interpretation of the federal constitution in this area has fallen to them.

A number of state courts have drawn a bright line in respect to supposed furtive movements in simple traffic-violation cases. They have voiced the principle that under these circumstances, "[m]ere furtive gestures

of an occupant of an automobile do not give rise to an articulable suspicion suggesting criminal activity." State v. Schlosser, 774 P. 1132, 1137 (Utah, 1989); Spence v. State, 525 So.2d 442 (Fla.Dist.Ct. App. 1988); People v. Mills, 115 Ill.App.3d 809, 71 Ill.Dec. 247, 450 N.E.2d 935 (1983); People v. Superior Court of Yolo County, 3 Cal.3d 897, 91 Cal. Rptr. 729, 478 P.2d 449 (1970).

The caselaw in New Jersey -- as clearly exemplified by the instant case -- has apparently evolved where such investigative frisks are deemed constitutionally permissible. See also Lightboure v. State, 438 So.2d 380 (FLA Supreme Ct. 1983) (furtive, nervous movements justify a frisk)

Although there can be no rules as to what comprises a reasonable apprehension of danger in each and every

imaginable circumstance, this Court, it is respectfully submitted, does have the ability to speak in an affirmative precise voice concerning the parameters of the federal constitution in respect to certain constantly re-occurring minor-traffic infraction situations involving which blow up into Fourth Amendment cases.

We respectfully urge the Court to hold that minor "furtive", nervous movements by an occupant in an automobile during a stop for a traffic infraction, without something more, does not give rise to a reasonable belief that the individual confronted is armed and dangerous.

At present, some courts either adopt or approve of the rule while others refuse to accept it.

Terry frisks represent a delicate

balancing act between the twin goals of insulating officers of the law from danger and preserving the individual's right of privacy under the Fourth Amendment.

In many cases throughout the country, however, under pretense of Terry, privacy rights have been sacrificed, indeed in many instances needlessly. Unfortunately, the kind of search that would thoroughly protect an officer -- a cross-eagle strip search -- would obliterate entirely the right of privacy under the Fourth Amendment. See generally United States v. Robinson, 471 F.2d 1082 (D.C.Cir. 1973)

We respectfully request the Court to grant certification and present more precise rules in minor traffic violation cases that will reach into the future in a substantial way by protecting

individual traveler's privacy rights on the roads and highways.

II.

REVIEW IS WARRANTED TO RESOLVE UNCERTAINTY CONCERNING THE SCOPE OF A SEARCH WHEN AN OFFICER DOES NOT TACTILELY IDENTIFY AN OBJECT DURING A FRISK.

In the case at bar, at the suppression hearing, the officer had no present recollection of how the bulge in the Petitioner's belt had felt during the patdown and prior to the actual searches in respect to Petitioner. See Motion to Suppress transcript of July 10, 1989, p. 68, line 8.

Petitioner urged below and respectfully continues to submit here that the ensuing search was unconstitutional in that the State failed to carry its burden of proving that the search was justified under Terry. See Katz v. United States, 389 U.S. 347

(1967).

State courts in New Jersey have stated that Terry does not require tactile recognition of a hard object which could be reasonably believed to be a weapon. See e.g. State v. Ransom, 169 N.J. Super 511, 521 (App.Div. 1979); State v. Kearny, 183 N.J. Super. 13 (App.Div. 1981), cert. den. 89 N.J.Super. 449 (1982).

However, other courts have taken an opposing position, drawing a division between hard and soft objects. See e.g. United Stated v. Walker, 576 F.2d 253, 255 (9th 1978) (officer felt hard object; further search was constitutional); United States v. Morales, 549 F.Supp. 217, 221, 224 (S.D.N.Y. 1982) (hard object validates search); United States v. Del Toro, 464 F.2d 520, 521 (2nd 1972) (small creased object; unreasonable for police to believe

it could be a weapon).

We respectfully suggest that the Court rule that it should only be in the unusual circumstance where the police are possessed with special and specific information of "soft-object danger" that they may patdown and search any unknown object.

The decision in the case at bar is shockingly wrong, and the importance of the question involved and the need for clarification warrant that it be heard by the final federal judicial tribunal.

III.

REVIEW IS WARRANTED SINCE CONFUSION AND UNCERTAINTY HAS ARISEN AMONG THE CIRCUITS CONCERNING THE APPLICATION OF THE RISTANO "SIGNIFICANT LIKELIHOOD" STANDARD IN REGARD TO RACIAL-PREJUDICE INQUIRY DURING VOIR DIRE PROCEEDINGS.

In a criminal trial, an accused is guaranteed an impartial jury under

the Sixth Amendment applied to the states through the Fourteenth Amendment. To uphold this right, the voir dire proceeding is used to flush out those prospective jurors who are racially biased and to create a jury panel of impartial jurors.

In Ristano v. Ross, 424 U.S. 589 (1976), this Court held that in his/her broad discretion a trial judge is only required to inquire about racial prejudice in special circumstances -- that is, when "under all the circumstances presented there was a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be 'indifferent as [they stand] unsworne.'" Id. at 596 (cit. omitted)

This standard was designed to detect and thus remove prejudiced jurors.

This Court did not, however,

furnish examples of any new special circumstances necessitating racial-bias inquiry, thus unfortunately leaving confusion as to how to apply the standard.

The case at bar is illustrative of the need for elucidation of the voir dire test. The questioning here revealed -- in some instances serendipitiously -- that members of the jury pool were racially prejudiced. Specific individualized questions were needed to weed out all of the biased jurors. Yet the trial judge, believing he was following the law, continued to decline to conduct individualized, specific questioning on this issue.

As a result, we respectfully maintain, the Petitioner was denied his due process rights to a fair and impartial jury.

Due to the lack of any clearly

drawn examples of what is constitutionally impermissible under Ristano, there is a conflict among the courts of appeal as to when a judge's failure to question the potential jurors on racial prejudice will result in reversible error. See cases cited in Rosales-Lopez v. United States, 451 U.S. 182 (1981).

Several circuits hold the opinion that a per se rule requires reversal when the trial judge fails to question on racial or ethnic prejudice requested by a defendant who is part of a minority group. See discussion in Rosales-Lopez, supra. Other circuit apply different rules. See e.g. United States v. Bowles, 574 F.2d 970, 972 (8th Cir. 1978) (though judge has broad discretion, he cannot, however, refuse to make appropriate inquiry as to possible racial prejudice); United States v. Polk, 550 F.2d 1265

(10th Cir. 1977) (judge must examine whether or not it is a violent crime and then determine proper line of questioning).

The Ninth Circuit, Darbin v. Nourse, 664 F.2d 1109 (9th Cir. 1981), has stated,

> Questions which merely invite an express admission or denial are of course a necessary part of voir dire because they may elicit responses which will allow the parties to challenge jurors for cause. However, such general inquiries often fail to reveal relationships or interests of the jurors which may cause unconscious or unacknowledged bias. For this reason, a more probing inquiry is usually necessary.

Additionally, it should be noted that this Court recognized a different nonconstitutional standard -- a reasonable possibility standard -- required in the federal courts under the Supreme Court's supervisory power. This has served to

further create unequal treatment of defendants in the federal and state courts.

We respectfully maintain that especially where, as in the case at bar, racial prejudice in the jury pool is revealed, a more probing inquiry should be in all courts constitutionally mandated.

In general, group-styled questioning does not provoke disclosure and makes it easy to mask prejudice - simply do not raise your hand. For clearly, not all jurors will tell the truth. They may want to lie, may simply be embarrassed to admit their prejudice or may be unaware of the prejudices which they are harboring.

But when a taint in the pool does come to light, no court should be allowed with constitutional impunity

to continue the group-type questioning.

Hence, we respectfully submit that this Court needs to clarify and instruct on certain specific limits to the Ristano standard or the law will be left in confusion and many other persons, apart from the Petitioner, will be adversely affected.

CONCLUSION

For the foregoing reasons, both separately and cumulatively, we respectfully urge that a writ of certiorari should issue and the decision below should be reversed.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3953-89T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KEVIN McKNIGHT,

Defendant-Appellant.

Submitted February 26, 1991 - Decided APR-1 1991

Before Judges O'Brien and Keefe.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County.

Persky & Persky, attorneys for appellant (Susan B. Persky, on the brief).

Robert J. Del Tufo, Attorney General of New Jersey, attorney for respondent (Janet Flanagan, Deputy Attorney General of counsel and on the brief).

PER CURIAM

Defendant Kevin McKnight appeals from his conviction for possession of cocaine

in violation of N.J.S.A. 2C:35-10a(1) and possession of cocaine with intent to distribute it in violation of N.J.S.A. 2C:35-5a(1) and N.J.S.A. 2C:35-5b(2). As a result of his conviction he was sentenced on each count to an indeterminate term of five years at the Youth Correctional Facility, the sentence to run concurrently. The trial judge also imposed a $60 VCCB penalty, a $100 forensic lab fee, and a six month suspension of defendant's driving privileges. In addition, statutory penalties of $3000 were imposed.[1]

On appeal, defendant contends that the trial judge improperly reconsidered his

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[1]While we note that the trial judge at sentencing imposed a $3000 DEDR penalty, the judgement of conviction incorrectly lists a $2000 penalty. The $3000 penalty imposed by the trial judge controls and judgment of conviction should be amended accordingly. See State v. Pohlabel, 40 N.J. Super. 416 (App. Div. 1956).

initial decision to suppress the warrantless search of defendant's person and that, even if the trial judge was procedurally correct in reconsidering his initial decision, the latter decision denying defendant's motion to suppress was erroneous as a matter of law. Further, as to trial error, defendant claims that the trial judge erred in failing to permit defense counsel to question the jury panel concerning racial prejudice and that prosecutorial misconduct deprived defendant of a fair trial. Our review of the record in light of the issues presented satisfies us that no error exists and that defendant's conviction and sentence must be affirmed. R. 2:11-3(e) (2).

Although the circumstances under which defendant's vehicle was stopped and the details of the subsequent pat down frisk

of his person and search of his vehicle were disputed at the suppression hearing, the motion judge's findings of fact are amply supported by the evidence, giving due deference to his ability to judge the credibility of the witnesses. State v. Johnson, 42 N.J. 146, 161-162 (1964). The operative facts upon which Judge Van Tassel made his initial decision are as follows.

Officer Richard Cleri, a Bergen County Police Officer, was on patrol on November 25, 1988 at approximately 4:00 a.m. when he observed a motor-vehicle, later determined to have been operated by defendant, speeding southbound on I-95. The officer clocked the vehicle at 70 m.p.h. in a 55 m.p.h. zone and decided to stop the vehicle for that violation. As defendant's vehicle slowed down, the officer noticed some unusual movements by

the driver and passenger. The passenger in the right front seat bent forward, came back up, turned his body to reach behind the driver's seat and then returned to his normal sitting position. The driver made a quick and sudden movement of his shoulders up in the seat and then back down again.

Officer Cleri believed that these movements were "suspicious" and he "became concerned for... [his] own safety." He said that these movements, described by him as "furtive", aroused his suspicion that "a person might be trying to hide or conceal" something. As he approached the vehicle after stopping it, the officer noticed a third person was "crouched down in the back of the seat."

In view of these observations, the officer asked the occupants to place

their hands where he could see them and not make any sudden movements. He then asked the passenger in the front seat to step out of the car so that he could frisk him for weapons. In the course of the frisk, the officer felt a large bulge between the neck and shoulder. He could not determine from feeling it what it was. He, thus, moved the passenger's clothing to the side which revealed a large clear plastic bag containing "a green leafy vegetation."

He then advised defendant McKnight that he was going to pat him down for his "own safety." In doing so, the officer "felt a bulge along... [defendant's] belt line." Again, the officer testified that he could not identify what the bulge was, but when he felt it, he retrieved it. He described it as a "clear plastic bag" containing approximately one ounce of a

"white powdery substance" but there was also a portion which was "rock-like" and "hard to the touch." He also found a "tin foil packet of suspected cocaine" in the left front pocket of defendant's pants.

After placing defendant under arrest, Officer Cleri searched further and found $950 in cash on his person. The cash was in small denominations -- a single $50 bill, thirty-one $20 bills, twenty $10 bills and sixteen $5 bills. A Panasonic paging device was also found on defendant's person.

Judge Van Tassel initially concluded from this evidence that Officer Cleri was justified in stopping defendant's vehicle. However, he held the evidence taken from his person must be suppressed because only a pat down search for weapons was justified and he could only seize what objectively appeared to be a

weapon. He reasoned that because officer Cleri did not feel anything that seemed to him like a weapon, he was not permitted to seize the packages of cocaine. However, the judge did not suppress the rest of the drug paraphernalia that Officer Cleri found in plain view. (This evidence included a brown paper bag containing a jar of a substance later identified as Inositol, a drug cutting agent, and another bag which had several packages of glassine bags, tubes, vials and caps.)

By letter dated October 11, 1989, Judge Van Tassel advised counsel that he had reconsidered his initial decision and concluded that the defendant's motion to suppress must be denied in all respects. In doing so, he substantially relied upon State v. Kearney, 183 N.J. Super. 13 (App. Div. 1981), certif. denied 89 N.J.

449 (1982) and an unreported decision of this court, State v. Alfred R. Miners, A-4453-86T5, decided October 26, 1987. Defendant's motion for leave to appeal to this court was denied, and the matter proceeded to trial as indicated earlier.

We first address the procedural issues presented by defendant's argument.

Before Judge Van Tassel entered the order resulting from his initial decision, the prosecutor sent him a "letter brief in lieu of more formal brief." The caption of the letter brief was as follows:

> Re: State v. Kevin McKnight
> Indictment S-0213-89
> State's Motion Requesting
> Reconsideration of Court's
> Decision Granting Defendant's
> Motion to Suppress.

A copy of the brief was sent to defense counsel. Defendant does not deny that his attorney received a copy of it. However,

the brief was not accompanied by a formal motion nor was one filed with the court.

Defendant asserts that, as a result of the irregularity in the form of the motion, defendant did not respond to it. He claims that failure of the State to adhere to the normal motion practice deprived him of a meaningful opportunity to be heard on the merits. He also claims that there is no recognized procedure for a motion to reconsider a motion to suppress.

A suppression ruling is an interlocutory order. State v. Reldan, 100 N.J. 187, 205 (1985). In Reldan, the Supreme Court held that the trial court had authority to relitigate and decide differently defendant's motion to suppress evidence in a case remanded for a new trial even though the State had not sought interlocutory leave to appeal

after the first decision granting defendant's suppression motion. Id. at 207. That ruling is entirely consistent with the general rule expressed in Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 257 (App. Div. 1987), certif. denied, 110 N.J. 196 (1988) which held that "the trial court has the inherent power, to be exercised in its sound discretion, to review, revise reconsider and modify its interlocutory orders at any time prior to the entry of final judgment." Moreover, the "unrelaxable ten-day motion for reconsideration" rule under R. 1:7-4 and R. 4:49-2 is "applicable to final dispositions [but not] interlocutory orders." Id. at 263 n. 8.

We next consider the question of whether defendant received appropriate notice both under the rules of court and

in accordance with the concept of due process. "[A]ny rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice." R. 1:1-2. While the State's letter requesting reconsideration did not conform to the letter of R. 1:6-2(a), it captured at least the spirit of the rule in that it advised defendant of the "grounds" upon which the application was being made and the relief that was being sought. Despite this clear notice, defense counsel did nothing to advise the court of his opposition to the form or substance of the prosecutor's motion.

"Due process demand[s] nothing less... 'than an opportunity to appear and be heard in opposition to [an adverse motion].'" Zoning Bd. of Adjustment v. Service Elec. Cable T.V., 198 N.J. Super.

370, 379 (App. Div. 1985) (citing Kohn's Bakery, Inc. v. Terraciano, 147 N.J. Super. 582, 584-85 (App. Div. 1977)). Defense counsel's receipt of the State's letter brief gave defendant the requisite notice and required defendant to respond in some fashion. Even after receiving Judge Van Tassel's opinion on reconsideration of the motion, defendant did not contend that he wished to be reheard on the subject because of lack of notice. While we do not approve of the practice followed here, we see no violation of defendant's due process rights.

We now turn to the substantive question of whether the search and seizure was constitutional. While, as defendant points out in his brief, furtive movements do not, standing alone, give rise to an articulable suspicion of

criminal activity, "there are some cases in which 'furtive' movements or gestures by a motorist, accompanied by other circumstances, will ripen into a reasonable suspicion that the person may be armed and dangerous or probable cause to believe that the person possesses criminal contraband." State v. Lund , 119 N.J. 35, 48 (1990) (emphasis added). We note that defendant's testimony at trial corroborated Officer Cleri's observations as to the suspicious movements of the occupants in the car. Defendant admitted that, as he brought his vehicle to a stop, the passenger in the front seat reached down, reached behind the seat and then reached towards the defendant. Defendant claimed that Mr. Alexander, the passenger, reached toward him and planted the cocaine on defendant without any explanation. We conclude that the

"lateness of the hour," the sudden suspicious movements of the occupants of the vehicle and the unexpected presence of the third individual crouched down in the back seat of the vehicle are the type of combined circumstances which objectively create reasonable suspicion of the type of criminal activity that justifies the pat down search authorized by Lund. Id. at 48.

The seizure of the package secreted on defendant's person near his belt was also proper even though the officer could not definitively conclude when he felt it that it was a weapon. A police officer is not obligated to recognize with certainty the nature of an object seized as a possible weapon in order for a pat down search to be valid. In our view, State v. Kearney, supra, is dispositive of this issue. In that case we quoted from State

v. Ransom, 169 N.J. Super. 511, 521-522 (App. Div. 1979), where we said:

> Clearly, a police officer does not need to perceive tactile recognition of a firearm before he may protect himself further by insisting on deliverance of the suspected weapon. It is not even necessary for him to identify by species the object of his concern, so long as the fear for his safety resulting from the pat-down is reasonable. A police officer is not required by his occupation or the Constitution of the United States to take unnecessary risks in the performance of his duties...

183 N.J. Super. at 18. Thus, we affirm Judge Van Tassel's ultimate conclusion that the seizure of the plastic bag of cocaine was proper, notwithstanding the fact that the police officer could not conclusively determine that it was a weapon simply by feeling it.

Defendant next contends that the trial judge erred in questioning the prospective jurors relative to their

potential racial prejudice. He contends that the judge's general questions relative to prejudice was insufficient to distinguish between prejudice based upon drug offenses and prejudice based upon race. However, the responses to those questions by the jurors revealed that they volunteered their views concerning both racial and drug matters. Therefore, it cannot be said that the jurors were confused about the nature of the inquiry.

The conduct of the voir dire rests with the sound discretion of the trial judge. Ristaino v. Ross, 424 U.S. 589, 594, 47 L. Ed.2d 258, 263 (1976). "[D]ue process does not compel questions about racial bias except in cases in which '[r]acial issues... [are] inextricably bound up with the conduct of the trial.'" State v. Ramseur, 106 N.J. 123, 244

(1987) (quoting Ristaino, supra, 424 U.S. at 596-597, 47 L. Ed.2d at 264).

> The fact that a defendant is black does not in itself demand that a judge must accede to a request to submit specific questions on racial prejudice to prospective jurors. As a corollary, the failure to make such inquiry in the normal case, absent other factors, does not constitute a violation of due process so as to mandate a reversal because of such failure.

State v. Long, 137 N.J. Super. 124, 131 (App. Div. 1975), certif. denied 70 N.J. 143 (1976). Here, as in Long, there were no racial overtones to the case. It was purely a drug case, not involving, for example, a black defendant and a white victim of a violent crime where racial overtones are typically considered to be relevant. See Ramseur, supra, 106 N.J. at 244. Thus, we conclude that the issue presented by defendant is without merit.

Lastly, defendant alleges that the prosecutor's conduct at trial and during his summation deprived defendant of his due process rights and went substantially uncorrected by the trial judge. Suffice it to say that we agree that the prosecutor's conduct during cross-examination of the defendant was improper. His conduct was objected to by defense counsel and the judge's disapproval of that conduct was appropriately communicated both to the prosecutor and the jury. However, the prosecutor's comment concerning that same event during his summation was, in our view, simply an effort on his part to ask the jury to decide the matter based upon the evidence and not on the inappropriateness of his conduct during trial. Moreover, the trial judge more than adequately instructed the jury that

the prosecutor's actions during cross-examination and his comments concerning that event in the course of his summation were not evidence and were not to have any bearing on their deliberations as far as guilt or innocence was concerned.

Prosecutorial misconduct is not ground for reversal of a criminal conviction unless the conduct was "so egregious that it deprived defendant of a fair trial." Ramseur, supra, 106 N.J. at 322. We are satisfied from our review of the record as a whole that the prosecutor's conduct, while objectionable, was appropriately cured by the trial judge's intervention and instructions.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/S/

Clerk

SUPREME COURT OF NEW JERSEY
C-957 September Term 1990
33,593

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs. ON PETITION FOR CERTIFICATION

KEVIN MCKNIGHT,

Defendant-Petitioner.

To the Appellate Division, Superior Court,

A petition for certification of the judgment in A-3953-89T3 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 18th day of June, 1991.